IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.311 OF 1995

Ramesh Chaitram Shelar,
Residing at Shemali,
Taluka Satana, District Nasik. ..Appellant
(Orig. accused)

V/s.

The State of Maharashtra ..Respondent.

Mr.P.K. Dhakephalkar for the Appellant.
Mr.D.R. More, A.P.P. for the Respondent/State.

CORAM : S.S. PARKAR, &
ANOOP V.MOHTA, JJ.

DATE : 5TH MAY, 2005.

ORAL JUDGMENT (**PER ANOOP V. MOHTA, J.**)

. The appellant was accused of murdering his wife Sushila (referred hereinafter " the deceased"), by setting her ablaze. By the impugned judgment and order dated 12/6/1995, the learned Sessions Judge, has convicted the appellant for the offence punishable under section 302 and Section 498-A of the Indian Penal Code (IPC). Therefore, this appeal.

2. The deceased was residing with the appellant, two sons and her mother-in-law in the small two- room house at Shemali, Taluka Satana, District Nasik. The deceased was resisting the insistence of the appellant

for the divorce, as he wanted to marry one Surekha, with whom he had illicit relation. The appellant was harassing and beating the deceased for the same. They were quarrelling regularly on this count. The reasons for their quarrel was known to the neighbours (P.W.2 to P.W. 6).

3. On 26/9/1989, at 12.30 a.m., just after midnight, the appellant ablazed the deceased, after pouring kerosene on her, when she was sleeping with their son Tushar. A neighbour, Vasant (P.W. 5), who was residing in the adjoining house of the deceased, heard shouts as "save me save me". He rushed and saw that the deceased was burning out side the house. He therefore, took out "Godhadi" from his house and tried hard to extinguish the fire. But the fire could not be extinguished completely. In the meantime, another neighbour, Dadabhau reached to the spot and able to extinguished the fire. Vasant, (P.W. 5) thereafter, went and called the brother of the Sarpanch, Ramesh (P.W. 2). Both reached to the spot and when enquired with the deceased, she expressed that," get yourself understand". Another neighbour, Bharat (P.W. 3), when reached also found the deceased in burning condition.

She was crying and telling that her husband set her on fire. The appellant was not present on the spot. P.W.2, Ramesh went and informed the Police Station, Satana. The police reached on the spot. The deceased had asked Ramesh, P.W. 2 to call her parents. The police took the deceased and her son to the hospital at Satana and admitted them in the hospital at 2.15 a.m.

4. Police Head Constable P.W. 7, on information from the hospital at Satana, sent Police Head Constable Bhoye and Honorary Magistrate (hereinafter referred "H.M.") Mr. Pakale, (P.W. 4) for recording a dying declaration (referred hereinafter as "first dying declaration") of the deceased. The said first D.D. (Exh.28) was recorded on 27/9/1989, in question and answer form in Marathi language. The said first D.D. was scribed in Marathi by the Police Head Constable, as H.M's eye sight was weak, and his hands were cramping. Dr. Hemant (P.W. 8) had granted due permission for recording the first dying declaration. The deceased had again stated that her husband set her on fire, as he wanted to perform second marriage. The deceased had put thumb-impression on the said statement. It is signed by the H.M. Dr. Hemant has also endorsed and signed it.

This Doctor has also endorsed on the top of the statement that "the patient is conscious and is in position to give statement". The said endorsement was given after examining the patient. In presence of Dr. Hemant, the H.M. had noted the first dying declaration. Dr. Hemant after basic treatment, had referred the deceased to Civil Hospital, Nasik.

5. On 27/9/1989 at about 6 a.m., the Special Executive Magistrate (referred hereinafter " SJM"), Jayprakash, P.W, 9, was called by a Police Head Countable,(P.W. 6) (Shaikh) from Bhadrakali Police Station to record an dying declaration (referred hereinafter as "second dying declaration") (Exh.46) of the deceased. Dr. Vasant Vaidya (PW 10) was on duty. After due examination and endorsement to the effect, that she was in a position to make the statement, the SJM had recorded the second dying declaration. Before recording, the SJM had, asked the doctor, and the police to leave the room. All the necessary questions and answers were exchanged in marathi. She was in a conscious condition. The deceased had reiterated that her husband-appellant set her on fire, as he wanted to marry with Surekha. The deceased made some additional

statements for the first time in this dying declaration. After completion of the recording, at about 7 to 7.30 a.m., a thumb-impression of the deceased was taken on it. Dr. Vaidya again examined the patient and put his signature after the endorsement about her stable and fit condition to give the statement (Eh.46). The dying declaration thereafter was forwarded alongwith Yadi Exh.47.

6. The parents of the deceased reached to the Nasik, Civil Hospital on 27/9/1989 at about 8 a.m. The deceased informed them, at 8.30 a.m., about the incident and the role of the appellant. As per P.W. 6-Tanaji, the father of the deceased, she was in conscious condition to speak and to make statement. At 4 p.m. on the same day, the deceased succumbed to the burn injuries. The post-mortem was conducted by P.W. 11 Dr. Sunil Shah. The cause of death was, shock due to burn of 96%, as recorded in post-mortem report and certificate (Exh. 51 and 50).

7. The spot panchanama was prepared on 27/9/1989 by P.W. 12- Rajendra, an Investigating Officer (I.O.) (Exh. 23). The seizure panchanama of muddemal articles

Exh.23 was also prepared. The articles and seized muddemal were sent to Chemical Analyser. The C.A. report is at Exh. 55. He recorded the statement of 8 witnesses. After receipt of the death information on 28/9/1989, the offence was registered under Section 302 of IPC, as crime No. 161/1989. I.O. received the inquest panchanama and the dying declarations on 30/9/1989. The map of the spot of incident was prepared by the Tahasildar on 19/10/1989. The accused was arrested on 24/10/1989, after his discharge from the hospital, as he had also received 22% burn-injuries. The statement of the parents of the deceased was recorded on 20/12/1989. After completion of the investigation, the charge-sheet was filed. The accused had denied the charges and pleaded not guilty. His defence was of total denial. His further defence was that he tried to extinguish the fire and the relatives of the deceased deposing against him falsely. No defence witness was examined.

8. The prosecution has examined 12 witnesses in support of the case. The learned Sessions Judge, after considering the material on the record and basically, two dying declarations of the deceased Exh. 28 and 46,

convicted the appellant for the offence punishable under Section 302 of IPC and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs. 500/- in default to suffer rigorous imprisonment for two months. The appellant has also been convicted for the offence punishable under section 498A of IPC and sentenced him to suffer rigorous imprisonment for two years and to pay fine of Rs. 500/- in default to suffer rigorous imprisonment for two months. The appellant was acquitted of the offence punishable under section 307 of IPC.

9. Heard the learned Counsel, Mr. P.K. Dhakephalkar for the appellant and the learned A.P.P. Mr. D.R. More for the respondent/State. We have gone through the record in extenso. After considering the rival submissions made by the Counsel appearing for the respective parties, we are also of the view, that the prosecution has proved the guilt of the appellant. The reasoning given by the learned Sessions Judge, in the facts and circumstances of the case, is correct. Therefore, we are confirming the order of conviction by recording the following reasons.

10. The dying declarations and its contents Exh.28 dated 27/9/1989, recorded at 2.30 a.m. and Exh.46 dated 27/9/1989 recorded at 7 a.m., are the basic foundation for the conviction. The same have been corroborated by the other evidence, including the medical evidence. It is a settled law that the dying declaration is admissible under section 32 of the Evidence Act, subject to strict scrutiny and closest circumspection to the statement as its truth cannot be tested by a cross-examination. Any tutoring or prompting also needs a close scrutiny, in the facts and circumstances. It is also necessary to satisfy that the deceased was in a fit state of mind to make a statement, apart from his or her consciousness. But the solemnity and sanctity attached to the words of a dying person also cannot be overlooked. After all these scrutinies, if a Judge is satisfied that the dying declaration is true and voluntary, the person can be convicted based upon the same. The dying declaration recorded by the authorised Magistrate in proper manner, after exchanging the requisite questions and answers and by following and complying with all the necessary formalities and with such endorsement, can not be skate over. The Apex Court’s decision in **1976 Cr. L.J. 1548 (K.**

Ramchandra Reddy and another V. The Public Prosecutor) once and again reiterated the above principles, as based upon the Apex Court's decision. **AIR 1958 S.C. 22 (Khushal Rao V. State of Bombay)**. The Apex Court has again elaborated the said principles in **2004 AIR SCW 7396 (Muthu Kutty and another V. State by Inspector of Police Tamil Nadu)**.

11. The first dying declaration Exh.28 recorded by P.W.4, the H.M. on 27/9/1989, even though scribed by the Police Head Constable, was recorded in presence of the Doctor P.W 8, after obtaining the due permission from the said Doctor and after due exchanges of the questions. The statement was recorded in Marathi, the known language of the deceased. She made positive statement that her husband setting her on fire, as he wanted to marry second time and he was always harassing for the same. The first dying declaration was duly endorsed and signed by the H.M. The Thumb-impression of the deceased was also taken on the same, after reading the contents to her satisfaction that it was written as per her say. She also stated that her husband Ramesh and their son Tushar was in the house, when her husband set her on fire by pouring kerosene. Merely because,

there was no endorsement made below the thumb-impression of the deceased, as sought to be contended by the Counsel appearing for the appellant, the whole statement cannot be discarded. It also cannot be discarded, as it was written in Marathi language by the said Police Head Constable. Even though, she was also replying in "Airani" language as extracted in the cross-examination of P.W.4. There is a deposition to the effect that she was also answering in Marathi language. The H.M's. weak eye sight, age about 72 years and cramping hands,at the relevant time, on these counts also the first dying declaration in question cannot be over looked. This procedural lacuna in the facts and circumstances of the case, nowhere disturbed the sanctity and solemnity of the dying declaration. Dr.Hemant Haralkar (P.W.8) has categorically stated that he had examined the patient, before and after recording the statement.The doctor has supported the prosecution case, that the deceased was admitted in the hospital on 27/9/1989 at about 2.15 a.m. and he had given treatment and informed the police. This Doctor has categorically stated that the patient was in a position to give statement. This Doctor has put necessary endorsement before and also after recording the statement of the deceased and signed the

same. This Doctor has deposed that the deceased was referred to the Civil Hospital, Nasik as her condition was critical. There is nothing on the record to discard or disbelieve the evidence of these two witnesses P.W. 4 and P.W. 8.

12. The sound mental condition and ability to make the statement and consciousness of the patient, if endorsed and recorded by the Doctor, in such cases, in absence of such specific endorsement by the H.M. or such Magistrate, would not affect the said dying declaration.

13. The second dying declaration was recorded in the Civil Hospital, Nasik by the SEM at 7 a.m. on 27/9/1989. The P.H.C. had called the SEM as per Exh.47. Dr. Vaidya - P.W. 10 was on duty who examined and endorsed on Exh.46 that the deceased was conscious and in a position to speak. The SEM requested the Doctor, the police, and others to go out of the ward. No one was present in the room except the deceased and the SEM. The SEM after completing the essential formalities, recorded Exh. 46 in the question and answer form. The deceased in the second D.D. stated

that when she was sleeping, the husband wake her up and insisted for a signature on the divorce papers and also asked to bring Rs. 4000/- from her parents. The deceased resisted the same by stating that it would be difficult for her poor parents to fulfil the money demand. The appellant thereafter, poured kerosene and set her on fire by a match stick. She further stated that as she was crying and shouting, her husband appellant ran out. She was unaware who extinguished the fire. She further stated that their son who was sleeping with her, was also burnt; that she was taken to the Government Hospital at Satana; that after some time she was brought to the Government Hospital at Nasik. This statement was thereafter read over and her thumb-impression was also taken. Dr. Vaidya was called and he again endorsed after examining that the patient was able to give the statement. Dr. Vaidya has further deposed that it bears the thumbimpression of the deceased and his signature. There is nothing brought on the record, except minor discrepancy or omission or variance to disbelieve or discard the unshaken evidence of P.W.9 SEM and Dr. Vaidya-P.W. 10. On the contrary, the deceased reiterated and maintained the allegations and action of the appellant- her husband to the effect

that he ablazed her by pouring kerosene, as she was resisting to sign the divorce papers and the demand of Rs. 4000/-.

14. As pointed out, the second Dying declaration for the first time referred about the divorce paper, demand of Rs. 4000/- and the presence of her mother-in-law at the relevant time. The basic ingredients which are matching and corroborating with the first dying declaration that the appellant set her on fire by pouring kerosene, when she was sleeping as he wanted to marry second time, cannot be overlooked. This statement goes to the root of the matter.The first dying declaration also matches with the second dying declaration to the effect that their son Tushar was also got burn injuries, as he was sleeping with the deceased. This further corroborates that the deceased was harassed by the appellant and wanted to marry second time and therefore, committed the crime in question. We are satisfied that the second dying declaration also, as duly recorded by SEM, in presence of Doctor, after following before and after procedures of recording such dying declaration is truthful and reliable. Some additional statements made for the first time in the

second dying declaration as noted above, no way affect the first dying declaration and its contents. There are no material contradictions some so called improvements, if any, cannot affect the two dying declarations as sought to be contended by the learned Counsel appearing for the appellant. The deceased died on the same date at 4 p.m. After going through the evidence and the second dying declarations, we are convinced that there is nothing on the record to show that the deceased was not conscious or was not in sound state of mind. Both the dying declarations were recorded in Marathi, the known language of the deceased. Therefore, on this count also, we are of the view that the dying declarations are reliable. In view of this, we are also satisfied that both the dying declaration are consistent on main aspect and even, if there are some variance, those according to us are not sufficient to discard these two dying declarations Exh.28 and 46.

15. Another aspect which further supports the prosecution case that both the dying declarations made by the deceased when there were no close relatives or any one present to influence or tutor her, at the relevant time. Her parents reached at Nasik, Civil

Hospital at 8 a.m. Second dying declaration was recorded at 7 a.m.. The first dying declaration was recorded at about 2.15 to 2.30 a.m. Both the dying declarations were recorded at the earliest opportunity and without any influence of any kind. Therefore, such dying declarations and its contents need to be respected. There is nothing brought on the record that the deceased had falsely implicated the appellant-her husband. There is no reason to doubt these two dying declarations. There is nothing to doubt to its genuinnes, as rightly observed by the learned Sessions Judge, as all the necessary and material witnesses have corroborated and supported the prosecution case fully. All the witnesses have supported the prosecution case and link the chain of circumstances, which are ;

(a) P.W.5-Vasant and P.W. 3- Bharat heard the shouts of the deceased and ran towards the spot and saw that the deceased was burning, out of the house. P.W. 5, Vasant tried to extinguish the fire by Godhadi. The deceased was crying and telling that her husband set her on fire.

(b) Tanaji P.W. 6, the father of the deceased has also supported the prosecution case of ill-treatment and

harassment as the appellant wants to perform second marriage. This also corroborates with the evidence of P.W..w.3 and P.W. 4.

(c) P.W.2,3 and 5 have corroborated the illicit relations of the appellant, as narrated by the deceased. The deceased in both the dying declarations Exh.28 and 46 narrated the ill-treatment and harassment caused by the appellant, as he wanted to perform second marriage and as the deceased resisted to sign the divorce deed and or to fulfil the demand of money.

(d) P.W. 1 Bajirao also supports the panchanama, being a panch witness and also supports that one Godhadi, kerosene dabba, stove, pieces of saree, burn stick, cot with burn string, were found on the spot.

(e) The appellant-husband was not present on the spot even as per P.W. 3. P.W. 2, Ramesh reached to the spot and went to inform the Police Station, Satana. The deceased had also requested Ramesh to call her parents.Police took the deceased and her son to the Hospital at satana at about 2.15 a.m.

(f) The Police witness Avinash Kulkarni, P.W. 7 links the facts that after receipt of the Telephone message, he sent PHC. Bhoye to call H.M. and thereafter the crime was registered. H.M. (Mr. Pakale) (P.W. 4) reached to Satana Hospital and recorded first dying declaration of the deceased on 27/9/1989 Exh.28. Dr. Hemant P.W. 8 was present in the Hospital at Satana. The deceased had reiterated that her husband set her on fire, as he wanted to perform second marriage.

(g) The other connecting materials which supports the prosecution case, are the evidence of P.W. 12-Rajendra,I.O. and all the necessary proved documents like spot/seizure panchanama Exh.23, C.A. report Exh.55, inquest panchanama, dying declaration Exh.28 and 46.

(h) SEM, P.W. 9, Jayprakash recorded the second dying declaration at Civil Hospital Nasik, in presence of Dr. Vaidya, P.W. 10 who was on the duty. All the necessary formalities were completed before recording the second dying declaration also. The due endorsement and signature of Dr. P.W. 10 are on the second dying declaration dated 27/9/1989.

(i) On both the dying declarations there are endorsement and the thumbimpression of the deceased. Both the Doctors have made necessary endorsements before and after recording the said dying declarations. The deceased was in able and sound state of mind and was conscious as per both the doctors.

(j) The burn injuries to the son Tushar as proved and placed on the record also supports the dying declaration of the deceased as well as the prosecution case, which remained unshattered.

(k) The parents of the deceased reached at about 8 a.m. on 27/9/1989 at the Civil Hospital, Nasik. There were no relatives or any one present near the deceased at the relevant time to influence or tutor her to make such dying declarations.

(l) The cause of death was due to burn of 96% Exh.51 AND 50 as per p.W. 11, Dr. Sunil Shah.

(m) Independent witnesses, specially the neighbourers have corroborated the deceased’s dying declarations

apart from other evidence including of the medical evidence. All these witnesses remained unshaken in their cross-examinations therefore are reliable and connect the appellant with the crime in question.

16. In view of two dying declarations and all the connected circumstances, as proved and placed on the record, merely because prosecution failed to give justification to the 22% burn injuries to the appellant in the facts and circumstances of the case, we are not convinced to give any benefit to the appellant for the same, even otherwise such non explanation in the present case nowhere affect the prosecution case and contents of the dying declarations in question. In the statement under Section 313 of Cr.P.C., the appellant was unable to explain and in fact denied all the events and documents. The appellant in spite of the opportunity failed to support his defence and also failed to give proper explanation to the incident and his presence or absence on the spot at the relevant time, including his burn injuries, even though admittedly, he was arrested on 24/10/1989 after he discharged from the hospital.

17. For the reasons recorded above, we are also of

the view, that the prosecution has proved beyond reasonable doubt that the appellant has committed the offence in question, as defined under Section 498A of IPC and under Section 302 of IPC.

18. In view of this we are declined to interfere with the reasoning given by the learned Judge. There is no substance in the appeal. The impugned Judgment and order is maintained and confirmed. The appellant is directed to surrender to his bail bond forthwith. The appeal is dismissed.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]

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CORAM : S.S. PARKAR, &
ANOOP V.MOHTA, JJ.

DATE : 5TH MAY, 2005.

P.C.

. For reasons separately recorded the following order is passed.

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[S.S. PARKAR, J.]

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